United States of America

In the

Supreme Court of the United States

OCTOBER TERM, 1943

No. 230

FLORA COYNE, et al.,
Petitioners,
vs.
SIMRALL CORPORATION, et al.,
Respondents

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT AND BRIEF IN SUPPORT THEREOF

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SUBJECT INDEX

TABLE OF CASES CITED

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OCTOBER TERM, 1943

No.....

FLORA COYNE, Defendant, BERNARD J. COYNE, MARY COYNE, GENEVIEVE COYNE, BASIL WAYNE COYNE, CHARLES H. NIXON, PEARL NIXON, WELLINGTON NIXON, FRED J. TRUMPY, and MARTHA ROSE TRUMPY, so-called "Coyne Defendants," jointly and severally, Appellants,

vs.

SIMRALL CORPORATION, Plaintiff, and ALMA ANDERSON, MARY A. AURENTZ, ESTELLA C. BAUER, FRANK J. BEHM, HELEN BEHM, CHARLES H. BELL, HARRY M. BELL, JOSEPH BENJAMIN, GEORGE E. BERSETTE, MARK BICKNELL, WARD J. BLUNT, LEO G. BROTT, EDITH D. CONRAD, GEORGE A. CONRAD, CLARK D. CORE, EZRA L. DEIBLE, RALPH DENNING, DIVERSIFIED ROYALTIES, INC., a Michigan corporation of Saginaw, Michigan, NICK R. DODD, KATE EDMUNDS, ALFRED J. FLEMING, EDGAR I. FLEMING, LANGAN J. FOARD, HARRIET GODFREY, HARRY GODFREY, H. D. GORDON, ROLLIN C. GORDON, JOHN J. GUELFF, CHARLES V. HALE, D. CLARE HARRINGTON, DONALD E. HOLBROOK, ELMER S. HOLMGREN, ELIZABETH M. JACOBS, RICHARD JOHNSON, BESSIE JONES, MARGARET JONES, ROBERT T. JONES, MOLLIE KENT, ALBERT J. KOERNER, JOHN KOFFMAN, SYLVESTER LeVALLEY, JANE LUNDELL, MARY LOUISE LUNDELL, HAROLD MAAS, JANETTE MacLAREN, ALBERT S. MARTUS, ETHEL M. MARTUS, ARCHIE D. McINTYRE, GEORGE J. MOUTSATSON, KATINA MOUTSATSON, AUDREY WILCOX NELSON, WILLIAM F. NELSON, HERMAN E. OLSON, BELLE D. PALMER, PEARL K. PETERS, SILAS PETTIT, GEORGE W. PIRTLE, EDWARD PRIOR, JR., IMO G. PRIOR, GERTRUDE QUINLAN, GROVER L. RIDDLEMOSER, LEILA B. RIDDLEMOSER, GEORGE V. ROWE, FRANK RUSSELL, JR., JAMES E. RYAN, SCHEID & COMPANY, a Michigan corporation of Mt. Pleasant, Michigan; ALBERT H. SCHROEPPEL, IVERNA H. SCHROEPPEL, EUNICE C. SHIDEMAN, LEO K. SHOWALTER, Trustee, ELMER SMEBERG, ANNA D. STANLEY, DAVID A. STEELE, MAE B. STEELE, IVA L. STORNE, MATTIE L. STORNE, CLARK E. TERRY, PHOEBE L. TERRY, BENJAMIN TRAINES, ROSE TRAINES, FRANK O. WILKINS, THOMAS T. WRIGHT and ADONIJAH J. YOUMANS, so-called "Adverse Defendants," Appellees.

PETITION FOR WRIT OF CERTIORARI

MAY IT PLEASE THE COURT:

The petition of Flora Coyne, Bernard J. Coyne, Mary Coyne, Genevieve Coyne, Basil Wayne Coyne, Charles H. Nixon, Pearl Nixon, Wellington Nixon, Fred J. Trumpy and Martha Rose Trumpy respectfully shows to this Honorable Court:

A.

SUMMARY STATEMENT OF THE MATTER INVOLVED

On May 3, 1937, Flora Coyne, one of the petitioners, was the owner of several contiguous tracts of land situated in Freeman Township, Clare County, Michigan, described as follows:

> NW fr/4 (containing 177.74 acres); N/2 of SW/4 (containing 80 acres); NW fr/4 of NE fr/4 (containing 47.44 acres); and SW/4 of NE fr/4 (containing 40 acres); all in Section 4, Township 18 North, Range 6 West, containing in all 345.18 acres, more or less (R. 2).

On said date of May 3, 1937, Flora Coyne executed and delivered an oil and gas lease to the Carter Oil Company, of Tulsa, Oklahoma, as lessee, which lease covered all of said lands and was duly recorded on May 21, 1937, in the Office of the Register of Deeds for said County of Clare in Liber 93 of Deeds at page 493 (R. 2).

The lease provided a one-eighth royalty to the lessor (R. 19). Said lease was made on a printed form and contained the following provision which petitioners herein refer to as the "royalty apportionment clause":

"It is covenanted and agreed that should the fee of said land be divided into separate parcels, held by different owners, or should the rental or royalty interests hereunder be so divided in ownership, after the execution of this lease, the obligations of the lessee hereunder shall not be added to or changed in any manner whatsoever as specifically provided by the terms of this lease. Notwithstanding such separate ownership, lessee may continue to drill and operate said premises as an entirety. PROVIDED, EACH SEPARATE OWNER SHALL RECEIVE SUCH PROPORTION OF ALL RENTALS AND ROYALTIES ACCRUING AFTER THE VESTING OF HIS TITLE AS THE ACREAGE OF THE FEE, OR RENTAL OR ROYALTY INTEREST, BEARS TO THE ENTIRE ACREAGE COVERED BY THE LEASE, OR TO THE RENTAL AND ROYALTY INTEREST AS THE CASE MAY BE. * * *" (Capitals ours).

(Exhibit "A," Oil and Gas Lease—R. 18—Provision on R. 23).

Flora Coyne, subsequent to the execution and recording of said oil and gas lease, executed and delivered mineral deeds on printed forms to the following named persons on the dates and covering an undivided interest in the oil and gas in the tract described opposite their respective names (R. 25):

(1) A. J. Fleming — July 9, 1938
½ NW fr/4 of NE fr/4 of Section 4

(2) Carl J. Westlund — July 11, 1938
5/40 NW fr/4 of NE fr/4 of Section 4

(3) Gertrude Quinlan — July 11, 1938
¼ NW fr/4 of NE fr/4 of Section 4

(4) Richard Lueder — July 11, 1938
¼ SW/4 of NE fr/4 of Section 4

(5) Carl J. Westlund July 11, 1938
5/40 SW/4 of NE fr/4 of Section 4

(6) Harry M. Bell and Edward Prior, Jr.
July 12, 1938
20/40 SW/4 of NE fr/4 of Section 4

(7) George W. Pirtle Sept. 21, 1938
1/40 SW/4 of NE fr/4 of Section 4

The mineral deed to Gertrude Quinlan contained the following provision:

> "Said land being now under an oil and gas lease executed in favor of Carter Oil Co. it is understood and agreed that this sale is made *subject to the terms of said lease, but covers and includes 1/4th of all of the oil royalty and gas rental or royalty due and to be paid under the terms of said lease insofar as it covers the lands above described*" (Exhibit "C" R. 27) (Italics ours).

ALL OF THE OTHER MINERAL DEEDS CONTAINED THE SAME PROVISION except that the amount of interest in each conformed to their respective fractional interests as above set forth (R. 4).

The respondents, other than Simrall Corporation, were the grantees in the above designated mineral deeds and their assignees under the same form of mineral deeds (R. 4).

The respondent Simrall Corporation is a company engaged in the business of purchasing and gathering crude oil in the State of Michigan, and is the purchaser of the oil produced from the leased premises (R. 7).

The petitioners, other than Flora Coyne, are, for the most part, persons related to Flora Coyne and who have acquired from her under the same form of mineral deeds

fractional mineral interests in parts of the leased premises other than the tracts described in the mineral deeds under which the respondents claim (R. 6 and 7).

The owner of the oil and gas lease is not a party in this suit.

Three of the grantees in the mineral deeds from Flora Coyne, under which the respondents are claiming, were produced by respondents as witnesses on their behalf and testified that they were experienced royalty buyers; that they provided the mineral deed forms which were used in their transactions with Flora Coyne; that they were thoroughly familiar with the provisions of the mineral deed forms; that each of them knew such form expressly recited that the sale covered thereby was subject to all of the terms of the oil and gas lease; that each of them knew the lease was of record; that one of such royalty buyers visited the Office of the Register of Deeds and there examined the recorded lease before completing his purchase; that another of such royalty buyers, before consummating his transaction, secured an opinion of title from his attorney; that each of said grantees understood that his purchase was subject to the terms of the oil and gas lease as the deed so expressly stated; and that the deed was the same as though all of the terms of the lease were contained in the deed word for word (R. 237 to 254 and 339 to 354).

It was conceded at the trial of this cause by the attorney for respondents that the testimony of the other grantees from Flora Coyne would have been repetition of the above testimony given by the three grantees that were produced (R. 339).

IT IS NOT DISPUTED, AND AS FOUND BY BOTH THE TRIAL AND APPELLATE COURTS, THAT

NEITHER FLORA COYNE NOR ANY OF HER GRANTEES KNEW THAT THE ROYALTY APPORTIONMENT CLAUSE WAS CONTAINED IN SAID OIL AND GAS LEASE, AND HAD NO KNOWLEDGE WHATSOEVER OF ITS EXISTENCE UNTIL THEY WERE INFORMED BY SIMRALL CORPORATION (R. 211; R. 487 and R. 493).

On January 5, 1939, which was subsequent to the time Flora Coyne executed and delivered all of said mineral deeds, the owner of the lease brought in a producing well on the leased premises. Thereafter three additional producing wells were drilled thereon. All of said wells are located on the two tracts of land described in the mineral deeds under which the respondents (other than Simrall Corporation) are claiming. No further wells have, as yet, been drilled on any other part of the leased premises (R. 7).

Simrall Corporation, pursuant to its customary practice, caused an examination of title to the premises to be made so that it would be advised as to the division of the proceeds for the oil produced from said wells. Division orders on the printed form of Simrall Corporation were obtained. Said orders set forth the divisions of interest on a basis of ownership in the producing tracts, rather than on a *pro rata* basis of ownership in the entire leased premises in accordance with the royalty apportionment clause contained in the lease. Simrall Corporation explains that this was done because their examination of title did not disclose the fact that the oil and gas lease contained a royalty apportionment clause (R. 8 and 261).

Simrall Corporation discovered its mistake and obtained knowledge of the royalty apportionment clause in November, 1939, and upon being so informed, they suspended

payments and impounded the royalty (R. 9). Thereafter, Simrall Corporation released payments for the October and November, 1939 production on the basis of its existing division orders, but impounded all other and future royalty funds, and subsequently, on February 13, 1941, filed this suit of interpleader (R. 330).

Before filing this suit, Simrall Corporation attempted to obtain the execution of an agreement which had for its purpose the deletion of the royalty apportionment clause from the lease, but the same was not obtained and no claim is asserted by any of the respondents thereunder (R. 12, 357 and 359).

Flora Coyne had no knowledge that the royalty apportionment clause was contained in the oil and gas lease until she was informed thereof by Simrall Corporation in October, 1939, which was two and one-half years after she made the lease and which was a considerable time after she made the mineral deeds and signed the division orders (R. 487, 25-26, 26-29, 29-30 and 30-33).

The respondents in their original pleadings and until the conclusion of the trial sought to have the royalty apportionment clause contained in the lease adjudged to be invalid. At the conclusion of the trial, the respondents requested and obtained permission to amend their pleadings, seeking to reform the mineral deeds in a manner so that their mineral deeds would remain subject to all the terms of the oil and gas lease except the royalty apportionment clause (R. 220-221).

The District Court granted reformation of the mineral deeds in the following language:

> "So the decree is that these people be paid according to their description just as if that clause, in the Carter lease, wasn't in there at all" (R. 219).

The United States Court of Appeals for the Sixth Circuit affirmed the reformation decreed by the District Court (R. 494).

It is the claim of the respondents that since neither they nor Flora Coyne were aware of the royalty apportionment clause contained in the lease, making the royalty payable on a basis that their ownership bore to the entire leased acreage, that there was, therefore, a mutual mistake of fact which should be corrected by a reformation of the mineral deeds in a manner calculated to render the royalty apportionment clause in the lease inoperative.

It is the claim of the petitioners that since the mineral deeds were made expressly subject to the terms of the lease, that they were as much subject to the royalty apportionment clause as to any of the other terms of the lease; that, in fact, the deeds would have been so subject without an express stipulation contained therein as the lease was of record and all the parties were charged with constructive notice of its terms and provisions. It is the further claim of petitioners that since the parties knew there was an oil and gas lease, but were aware that they did not know its terms, there was no mutual mistake which would justify reformation of the mineral deeds; that even if the deeds could be reformed, such reformation would be unavailing as the lease terms would still control.

B.

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT

(1) The decision of the United States Circuit Court of Appeals for the Sixth Circuit does violence to the following universal and fundamental rules of law which are intended to safeguard the integrity and inviolability of contracts:

(a) A Court is not empowered to make a contract for the parties, which they themselves could not have lawfully and effectually made were they fully informed of all of the facts relative to their transaction.

(b) A Court is not empowered to make a new and different contract for the parties under the guise of reformation.

(2) The decision of the United States Circuit Court of Appeals for the Sixth Circuit is predicated on the following legal proposition, viz:

> "Where there is a mistake on one side, AND KNOWLEDGE OF THE MISTAKE PLUS CONCEALMENT, ON THE OTHER, reformation will be decreed" (R. 493) (Capitals ours).

which legal proposition, in fact, is utterly foreign to the case at bar, for it is undisputed, as the Appellate Court stated, that none of the parties had any knowledge of the existence of the royalty apportionment clause contained in

the lease, and without knowledge, there could be no concealment.

(3) The decision of the United States Circuit Court of Appeals for the Sixth Circuit is of general importance in that there are countless thousands of acres of land in the State of Michigan alone under existing oil and gas leases containing royalty apportionment clauses, and said decision creates a state of chaos with respect to the rights and interests of parties who have heretofore or will hereafter sell or purchase mineral royalty interests in such lands.

WHEREFORE, YOUR PETITIONERS RESPECTFULLY PRAY:

That a writ of certiorari be issued out of and under the seal of this Honorable Court, directed to the United States Circuit Court of Appeals for the Sixth Circuit, commanding that Court to certify and send to this Court for its review and determination, on a day to be therein named, a full and complete transcript of the record and all proceedings in the case numbered and entitled on its docket, Number 9596:

Flora Coyne, et al.,
Appellants,

v.

Simrall Corporation, et al.,
Appellees,

and that the said decree of the Court of Appeals for the Sixth Circuit may be reversed by this Honorable Court and that your petitioners may have such other and further

relief in the premises as to this Honorable Court may seem meet and just, and your petitioners will ever pray.

Flora Coyne, Bernard J. Coyne, Mary Coyne, Genevieve Coyne, Basil Wayne Coyne, Charles H. Nixon, Pearl Nixon, Wellington Nixon, Fred J. Trumpy and Martha Rose Trumpy, Petitioners.

By JEROME WEADOCK,
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DeVERE KOSTOFF,
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Saginaw, Michigan.

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FLORA COYNE, et al.,
Petitioners,
vs.
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Respondents

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

I.

THE OPINIONS OF THE COURTS BELOW

The opinion in the United States District Court for the Eastern District of Michigan, Northern Division, may be found in the Record on Page 205.

The opinion in the United States Court of Appeals for the Sixth Circuit is reported in 140 Fed. 2nd, Page 574, and also may be found in the Record on Page 486.

II.

JURISDICTION

Jurisdiction in this cause is based upon Section 240 (Amended) of the Judicial Code.

The date of the decree of the Court of Appeals for the Sixth Circuit affirming the decision of the United States District Court is February 10, 1944.

A petition for rehearing was filed in the Court of Appeals and was denied on the 20th day of March, 1944.

The time for filing certiorari was extended to July 5, 1944 by an order of the United States Supreme Court.

III.

STATEMENT OF THE CASE

A full statement of the case has been given under the heading "A" in the Petition, and, in the interest of brevity, the statement is not repeated in this supporting brief.

IV.

SPECIFICATION OF ERRORS

(1) The Court erred in finding and holding that the parties agreed to anything other than that the deeds would be subject to the lease.

(2) The Court erred in finding and holding that subjecting the deeds to a pro rata royalty provision in the lease was a mistake on the part of both grantor and grantees.

(3) The Court erred in finding and holding that this case came within the rule that where a contract is inad-

vertently disfigured by a mistake in the drafting of a written instrument, reformation may be decreed.

(4) The Court erred in finding and holding that this case came within the rule that where there is a mistake on one side, and knowledge of the mistake plus concealment on the other, reformation may be decreed.

(5) The Court erred in finding and holding that reformation of the mineral deeds was an appropriate remedy to accomplish indirectly a reformation of the oil and gas lease.

(6) The Court erred in finding and holding that the rights of the lessee or its successors under the lease were not in any way affected by the reformation of the mineral deeds.

(7) The Court erred in finding and holding that the lease did not in any way affect Mrs. Coyne's right to sell royalty shares in the land under lease, in whatever manner she desired, and that the lessee and its successors under the lease had no interest in any transactions between Mrs. Coyne and her grantees, unless it was one of convenience in the method of payment of the royalties.

V.

ARGUMENT

Summary of Argument

Point A

The decision of the United States Circuit Court of Appeals for the Sixth Circuit does violence to the following universal and fundamental rules of law which are intended to safeguard the integrity and inviolability of contracts:

(a) A Court is not empowered to make a contract for the parties, which they themselves could not have lawfully and effectually made were they fully informed of all of the facts relative to their transaction.

(b) A Court is not empowered to make a new and different contract for the parties under the guise of reformation.

Point B

The decision of the United States Circuit Court of Appeals for the Sixth Circuit is predicated on the following legal proposition, viz:

> "Where there is a mistake on one side, AND KNOWLEDGE OF THE MISTAKE PLUS CONCEALMENT, ON THE OTHER, the reformation will be decreed," (R. 493) (Capitals ours)

which legal proposition, in fact, is utterly foreign to the case at bar, for it is undisputed, as the Appellate Court stated, that none of the parties had any knowledge of the existence of the royalty apportionment clause contained in the lease, and without knowledge, there could be no concealment.

Point C

The decision of the United States Circuit Court of Appeals for the Sixth Circuit is of general importance in that there are countless thousands of acres of land in the State of Michigan alone under existing oil and gas leases containing royalty apportionment clauses, and said decision creates a state of chaos with respect to the rights and interests of parties who have heretofore or will hereafter sell or purchase mineral royalty interests in such lands.

POINT A

The decision of the United States Circuit Court of Appeals for the Sixth Circuit does violence to the following universal and fundamental rules of law which are intended to safeguard the integrity and inviolability of contracts:

(a) A Court is not empowered to make a contract for the parties, which they themselves could not have lawfully and effectually made were they fully informed of all of the facts relative to their transaction.

The entire substance of this case may be summarized in the following brief statement:

> Flora Coyne and her grantees thought that they were dealing only with respect to the tract of land described in their respective deeds, unaware of the royalty apportionment clause contained in the oil and gas lease, although each party understood that the sales thereby made were subject to all of the terms of the lease as the deeds so stated.

Therefore, the head and front of this suit is the royalty apportionment clause contained in the oil and gas lease.

The decision of the United States District Court, which was affirmed by the Court of Appeals, nevertheless, reformed the mineral deeds, not the oil and gas lease, which reformation in the language of the District Judge was as follows (R. 219):

> "So the decree is that these people be paid according to their description just as if that clause, in the Carter lease, wasn't in there at all."

The question to be first considered is: Could Flora Coyne and her grantees, even had they known the royalty apportionment clause was contained in the oil and gas lease, have inserted the above quoted language, or language of similar import, in their mineral deeds, and would the same have effectually circumvented the application of the royalty apportionment clause?

It is important to bear in mind that all of these mineral deeds were made by Flora Coyne before production was obtained on any part of the leased premises.

We quote at length from the leading case dealing with this question and which authority has been universally followed by every other Appellate Court that has had occasion to construe an oil and gas lease containing a royalty apportionment clause and mineral deeds made subject thereto, *Gypsy Oil Co. vs. Schonwald, et al.* (Oklahoma), 231 Pacific Reporter 864 on Page 867:

> "Even if the so-called mineral deed should be reformed for any grounds so as to show a conveyance to Schonwald of a fractional part of the royalty on the west 80 only, such attempt on the part of Clark would not be availing, if in fact the said pro rata clause of said lease is a valid burden

imposed upon the interest in the property retained by Clark after the execution of the lease. If said clause is a valid clause, Clark in executing the lease placed a restriction upon his power to alienate any part of his estate in the land covered by the lease, with a right on the part of the subsequent grantee of such fractional interest to participate in the royalty, *except in accordance with the said lease provision itself.*" (Italics ours.)

"We take it that if said clause is a valid contractual provision, after the premises have been found to be productive of oil and gas, and the primary purpose of the lease, to wit, the development, has been fully carried out by the lessee, it cannot be compelled to do other than pay the royalty, as per the terms of the lease, and whatsoever contract was made between the lesser and a subsequent purchaser could not be made effective to alter the duty of the lessee as to the royalty interest other than is set forth in its lease contract."

and on Page 868:

"In the instant case the lessor-owner of the entire 160 acres executed the lease on it as an entirety. That he had the right to place therein any provision which he deemed either to his advantage or to the advantage of a subsequent purchaser of a fractional interest in the land or the mineral estate therein seems clear as an incident to his ownership. He had the right to limit his sale thereof or manner of use thereof as to its entirety or any acreage within the whole, or any estate arising from any part thereof. What he did in fact was in the nature of a covenant which burdened his remainder to the extent that one purchasing subsequent to said lease contract, and subject to it, acquired an interest in the royalty on the whole acreage, prorated as the fraction thereof purchased bore to the entire tract. We

think it is well recognized that the whole estate in the mineral may be, as to sale thereof, separated from the other estates of the fee. When so done, interests therein are subject to contract. The clause here in question was, as to subsequent agreements of sale, tantamount to a severance of the owner's estate in the oil and gas mineral from the estate of the land itself, and covenanting that owners of a fraction of the whole estate in either should share in the oil and gas as per the pro rata clause thereof. If the purchaser succeeds by contract to the west 80 or a fraction thereof as to fee or mineral right, he takes same burdened with that agreement in the lease, and as the contract affects the mineral rights, it goes to all underneath the acreage covered by the lease."

"We think such agreements in their nature are covenants, and they can properly be held as binding on successors to the title or interest therein acquired by any one in privity with the covenanting parties, and that the same are equally binding on all, both where there is a burden to be endured or a benefit to accrue."

The Oklahoma Court then determined that a royalty apportionment clause in an oil and gas lease is a valid provision, as was further stated on Page 867:

"We cannot say that the clause drawn in question is unreasonable. Neither can we say that it is arbitrary or accompanied with a secret intent and desire on the part of the plaintiff in error, in securing the lease to put an unwarranted and injurious restriction upon the handling of the real estate by the lessor, and his right to make any disposition thereof."

"A small amount of practical knowledge of the oil and gas industry must be persuasive that in numerous cases a just and equitable division of

the royalty, in the absence of such clause, is all but an impossibility."

The Oklahoma Court pointed out the inequitable conditions that resulted where leases did not contain a royalty apportionment clause, in language found on Page 868:

> "These cases, and those from other courts cited, leave us not unmindful that the nature of oil and gas is such that a well may be actually located upon the portion not sold by the lessor, but so near the line of a subsequent grantee of part of the realty that a large per cent. of the production comes from that owned by the subsequent purchaser. This well-known fact makes such a condition exceedingly inequitable in numerous cases. Only recently this court adjudged, in Galt v. Metscher, 229 P. 522 (No. 11756), that the lessee had a right to develop the land as a unit, and the purchaser of the royalty on the south 80 of a 160-acre tract had no interest in a well drilled just 4 feet from the dividing line, though much oil came from the south 80. This in reality is taking that which belongs to the south 80 'within the law.' The lessee was under no legal obligation to drill an offset, but in fact has the right to drill wells along and near the line of the subsequent purchaser's part, and thereby in many cases take practically, if indeed not all, the oil from the subsequent purchaser's tract, without the owner receiving any part thereof. This court in the last-named case said in effect that the protective remedy is by contract made between the parties at interest."

> "Its binding effect on the parties and their successors in interest finds support in the considerations which move the execution of the instrument itself. Even if justification on other grounds were lacking, expediency and equity as to distribution should enforce recognition of such a provision."

> "As indicated above, the provisions of the contract between the owner of the entire estate, and the producer, which purposes forestalling inequitable conditions which would otherwise arise between such subsequent purchasers of fractional interest, should be sustained on principle."

Petitioners, without quoting, refer the Court to the following cases and authority relative to the above proposition:

Schrader, et al., vs. Gypsy Oil Co., et al. (New Mexico), 28 Pacific Reporter (2nd), Page 885.

Alling vs. Lynch (Oklahoma), 273 Pacific Reporter, Page 361.

Eason vs. Rosamond, et al. (Oklahoma), 46 Pacific Reporter (2nd), Page 471.

Shell Petroleum Corp. vs. Calcasieu Real Estate and Oil Co. (Louisiana), 170 Southern Reporter, Page 785, and 185 Louisiana Reporter, Page 751.

Harley vs. Magnolia Petroleum Corp. (Illinois), 37 Northeastern Reporter (2nd), Page 760.

Summers Oil and Gas, Volume 3, Section 608, Page 519, and Section 609, Pages 533 and 534.

From the foregoing authorities, it must be clear that Flora Coyne and her grantees, even had they known the royalty apportionment clause was contained in the oil and gas lease, could not have avoided application of such clause by inserting any provision whatsoever in their deeds.

In the case of *Gypsy Oil Co. v. Schonwald, et al., supra,* the Court pointedly observed that reformation of the mineral deeds could not be resorted to in order to circumvent

the above stated legal result of a royalty apportionment clause, in the following language on Page 867:

> "If in fact the mineral deed could be reformed on the ground of mutual mistake, so as to make it conform to what the plaintiffs contend was the purpose and intention of Clark and Schonwald, the question would then arise as to whether it could be effective as against the lessee in the face of this clause in the lease. If there were a mistake, it was a mistake between Clark and Schonwald. Plaintiffs apparently realize that if such reformation were had as to the mineral deed, it would doubtless be unavailing, unless the clause in question were held not to be binding upon subsequent purchasers from Clark even with constructive notice of all the terms and provisions of the recorded lease."

Also, in the case of *Harley vs. Magnolia Petroleum Corp.* (Illinois), 37 Northeastern Reporter (2nd), Page 760, which was a case directly in point with respect to reformation of like mineral deeds subject to an oil and gas lease containing a royalty apportionment clause, the Court observed on Page 765:

> "It is apparent that notwithstanding the deeds be so reformed as to show a transfer by the appellant of all her interest in any oil which might be produced in the 20-acre tract, the lessee, unless the terms of the lease were altered, would still be bound to make distribution in accordance with the terms of the lease, which, appellees have stipulated, is a valid and subsisting lease."

(b) A Court is not empowered to make a new and different contract for the parties under the guise of reformation.

There is no allegation, claim or evidence whatsoever i the case at bar that there was any mistake as to th mineral deeds being subject to the terms of the oil an gas lease. The effect of the decision in the case at bar however, was to make the deeds NOT subject to an impor tant provision in the lease, viz: the royalty apportion ment clause. By so doing, the Court has made a contrac for the parties which they never agreed upon and whic is in fact a new and different contract than the one ac tually made.

The petitioners contend that a Court is not vested wit such power, and rely on the following authorities:

In *23 Ruling Case Law,* Page 311, Section 4, the rul is stated in the following language:

> "The equity of reformation is not to make a nev agreement, but to establish and perpetuate the tru existing one. The court in recognizing the equit cannot make such a contract as it thinks the partie ought to have made or would have made, if bette informed, as by inserting in the instrument impor tant conditions which the parties never fully as sented to."

In *5 Williston on Contracts,* Page 4344, Section 154 it is said:

> "Still more clearly, if because of mistake as t an antecedent or existing situation, the partie make a written instrument which they might no have made, except for the mistake, the court can not reform the writing into one which it think they would have made, but in fact never agree to make."

In *5 Williston on Contracts* (Rev. Ed.), Page 4341, Section 1548, it is said:

> "It is not enough to justify reformation that the court is satisfied that the parties would have come to a certain agreement had they been aware of the actual facts."
>
> Note 9
>
> "In *Barrow v. Barrow,* 18 Beav. 529, Romily, M. R., said: 'I am not aware of any case and none has been produced to me, where, in the absence of fraud, such as the suppression of a fact that ought to have been communicated, this court has interfered to make a settlement conformable with what would have been the contract between the parties if all the facts material to be known by them had been present in their minds.' "

and in Volume 3, Par. 1549, it is said:

> "If, because of mistake as to an antecedent or existing situation the parties make a written instrument which they might not have made, except for the mistake, the court cannot reform the writing into one which it thinks they would have made, but in fact never agreed to make."

In *Russell vs. Shell Petroleum Corp.* (Kansas), 66 Federal Reporter (2nd), Page 86, which was an action to reform an oil and gas lease, the Court said:

> "To justify reformation on the ground of mistake, the mistake must have been made in the drawing of the instrument *and not in the making of the contract which it evidences.* (Italics ours.)
>
> "A mistake as to the existing situation which leads either one or both of the parties to enter into a contract which they would not have entered into had they been apprised of the actual facts will not justify reformation, for it is not what the parties would have intended had they known better,

but what they did intend at the time, informed as they were."

These statements of law relative to the reformation of contracts were applied in a case involving an oil and gas lease containing a royalty apportionment clause and the same form of mineral deeds as in the case at bar, made under identical circumstances, and for this reason, we quote at length from the case of *Harley vs. Magnolia Petroleum Corp.* (Illinois—1941), 37 Northeastern Reporter (2nd), Page 760, wherein it was held:

"Where parties to an agreement are ignorant of facts which, if known, would have caused a different contract, the remedy is rescission and not reformation. *Hoops v. Fitzgerald*, 204 Ill. 325, 68 N.E. 430. The query in such case is: Did the instrument, when executed, represent the actual contract of the parties? *Jacobs v. Wilkerson*, 373 Ill. 545, 26 N.E. 2nd 860. In this case the grantor and the grantees in the mineral deeds knew of the existing lease and contracted subject to it; all were then conscious that they were ignorant of its terms including the pro rata provisions."

"Equity cannot make a new agreement for the parties under the color of reforming the one made by them, or add a provision which they never agreed upon. Where a writing expresses an actual agreement it cannot be reformed by inserting provisions not agreed upon. These principles have been recognized in *Hoops v. Fitzgerald, supra*; *Broadwell v. Broadwell*, 1 Gilman 599; *Elliott on Contracts*, Sec. 101; 5 *Williston on Contracts*, 4341; *Curtis v. Albee*, 167 N.Y. 360, 60 N.E. 660. In *Farmers' Loan & Trust Co. v. Suydam*, 69 Neb. 407, 95 N. W. 867, 868, ignorance of facts was held not to be ground for reformation but for rescission. The court there observed: 'The difficulty in decreeing a reformation in this case consists in the

fact that the minds of the parties do not seem to have ever met upon the contract in the form in which it is sought to be put.' That observation is pointedly applicable to the facts in this case. It can scarcely be said that the deeds were made with intention to make them other than subject to the lease. They recite they are so subject, and, as sought to be reformed, they would not be subject to the lease in an important particular.

"What is sought by reformation here is a recitation in the deeds to the effect that they are not subject to the pro rata provisions of the lease, whereas the evidence does not indicate that the intention to make them other than subject to the lease was mutual. In fact, no evidence of such an intention at the time of the making of the deeds appears on the part of either party thereto. Both admit that they did not know that the lease conained the pro rata provisions. The recognized rule, as stated in *12 American Jurisprudence on Contracts,* par. 132, is that where the parties to an agreement enter into it in the face of their conscious present want of knowledge of facts, which they all thus manifestly conclude would not influence their action or induce them to refrain from entering into the agreement, whatever the facts might be, there is not such mistake of fact as to constitute ground for reformation of the agreement. In such a case the parties demonstrate that the existence or non-existence of such facts is of no consequence to them. To constitute a mistake which will be relieved against, the mutual ignorance of fact must be unconscious. In *2 Pomeroy's Equity Jurisprudence,* par. 839, the rule is set out that a mistake of fact, against which equity will grant relief, is 'an unconscious ignorance of forgetfulness of a fact, past or present, and material to the contract.' It was held in *Kowalke v. Milwaukee Electric Railway & Light Co.,* 103 Wis. 472, 79 N.W. 762, 763, 74 Am. St. Rep. 877, that

'the ignorance must be unconscious; that is, a mental state of conscious want of knowl whether a fact which may or may not exist so.' "

"Here the parties to the deeds testified that were conscious at the time the deeds were n that they were ignorant of the terms of the le yet the intention of the parties to the deeds that they were to be subject to the lease. To change the deeds as to make them not subject, only would be to change the lease which neit could do, but would be contrary to their agr and admitted intention. There is nothing in deeds tending to show that the parties expe to change the application of the lease. The gra could not do so and she testified she did not intend."

We observe that the Court of Appeals in the case bar attempted to reconcile its decision with and dis guish the case from *Harley v. Magnolia Petroleum Co supra,* but inasmuch as this is treated in our petition rehearing, our argument in this regard is not here peated (R. 495).

Although the Supreme Court of the State of Michi has not had an opportunity to decide a case directly point, it has recently applied the rules of reformat hereinbefore discussed in the case of *E. R. Brenner vs. Brooker Engineering Co.,* 301 Michigan Reports, P 719, where the Court said:

"While equity has power to reform a cont in order to make it conform to the agreement tually made, *Raymond v. Auto-Owners' Insur Co.,* 236 Mich. 393, nevertheless courts do not m new contracts for the parties."

"If the mistake is with respect to an extri fact, although one which probably would h

> caused the parties to make a different contract, reformation will not be allowed, because courts cannot make a new contract for the parties. *Lee State Bank v. McElheny, supra; DeGood v. Gillard,* 251 Mich. 85, and 53 C.J., p. 928."
>
> "See, also, *2 Pomeroy's Equity Jurisprudence* (1st Ed.), pp. 343-344."

It is observed that the Court of Appeals, in support of its decision, relied on the case of *Scott vs. Grow,* 301 Michigan Reports, Page 226, but wholly ignored the case of *E. R. Brenner Co. vs. Brooker Engineering Co., supra.*

POINT B

The decision of the United States Circuit Court of Appeals for the Sixth Circuit is predicated on the following legal proposition, viz:

> "Where there is a mistake on one side, AND KNOWLEDGE OF THE MISTAKE PLUS CONCEALMENT, ON THE OTHER, reformation will be decreed," (R. 493) (Capitals ours)

which legal proposition, in fact, is utterly foreign to the case at bar, for it is undisputed, as the Appellate Court stated, that none of the parties had any knowledge of the existence of the royalty apportionment clause contained in the lease, and without knowledge, there could be no concealment.

It should be sufficient argument here to inquire how the Circuit Court of Appeals could have properly adjudicated the case at bar on the above legal proposition, after making the following unequivocal statements of fact in its opinion, found in the record on Pages 487 and 493, respectively:

"Although relying upon it at the present time, Mrs. Coyne, who is one of the appellants herein, never saw this pooling, or pro rata, provision at the time the lease was made, nor for two and a half years thereafter, and knew nothing about it during that time."

"None of the parties knew of the pro rata provision in the lease, and none of them had ever heard of such a provision in an oil lease."

POINT C

The decision of the United States Circuit Court of Appeals for the Sixth Circuit is of general importance in that there are countless thousands of acres of land in the State of Michigan alone under existing oil and gas leases containing royalty apportionment clauses, and said decision creates a state of chaos with respect to the rights and interests of parties who have heretofore or will hereafter sell or purchase mineral royalty interests in such lands.

The modern forms of oil and gas leases contain a royalty apportionment clause (*Summers Oil and Gas,* Volume 3, Page 534, Section 609).

The testimony in the case at bar shows that the Gulf Refining Company and The Pure Oil Company, both of which operate in most of the oil producing states in the Union, have leased approximately 456,000 acres of land in the State of Michigan alone under this modern form of oil and gas lease (R. 364, 365, 372 and 373). These companies are only two of the many oil producers in the State of Michigan.

Under the authorities petitioners have cited, it is clear that a royalty apportionment clause in an oil and gas

lease is one inserted for the mutual benefit of lessor and lessee, and is inescapably invoked when, and only when, the lessor sells an interest in a part of the leased premises, that is to say, where the ownership of the lessor's interest is divided into separate tracts held by different owners.

The Circuit Court of Appeals has held in effect that a royalty apportionment clause is one solely for the convenience of the lessee in the method of the payment for the royalties. At the same time, it has held that the lessor, by dividing the ownership of the leased premises into separate tracts, effects a division of the royalty on the basis of such ownership in such separate tracts. Notwithstanding such construction, the Court has reformed the mineral deeds.

Petitioners point out the inconsistencies of such holding: First, if the clause was not binding on the lessor, that is to say, if the lessor could, by dividing the ownership of the leased premises into separate tracts, effect a division of the royalty on the basis of such ownership in such separate tracts, then the right of the lessee to invoke the clause and pro rate the royalties to the ownership of the entire leased premises would thereby be destroyed. Second, if the clause was not binding on the lessor, no reformation of the mineral deeds would be required to effect a division of the royalty on the basis of ownership in the separate tracts.

The decision of the Circuit Court of Appeals (which petitioners have shown is contradictory to and in conflict with the overwhelming weight of authority) creates a state of chaos with respect to the rights and interests of parties who have heretofore or will hereafter sell or purchase mineral royalty interests in lands subject to lease containing royalty apportionment clauses. If a royalty ap-

portionment clause is a valid provision, which the Appellate Court has not denied, these parties are told by this decision that their rights and interests cannot be determined and could not be adjudicated until such time as the leased premises may be productive and the lessee makes its decision as to what manner it then finds convenient to pay for the oil.

This matter is more fully illustrated in our petition for rehearing, on Pages 501 to 504 of the record.

CONCLUSION

It is, therefore, respectfully submitted that this case is one calling for the exercise by this Court of its supervisory powers, in order that the integrity and inviolability of contracts shall be preserved, and in order that the rights and interests of persons buying and selling oil and gas royalties in lands under leases containing royalty apportionment clauses shall be certain and determinable from the contracts evidencing such rights and interests, independent of subsequent circumstances involving the development of the premises, and that to such an end a writ of certiorari should be granted and this Court should review the decision of the Circuit Court of Appeals for the Sixth Circuit and finally reverse it.

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(26)

In the Supreme Court of the United States

OCTOBER TERM, 1944.

No. 230.

FLORA COYNE, *et al.*,
Petitioners,

vs.

SIMRALL CORPORATION, *et al.*,
Respondents.

ANSWER TO PETITION FOR WRIT OF CERTIORARI
To The United States Circuit Court of Appeals
For the Sixth Circuit, and
BRIEF IN SUPPORT THEREOF.

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ANSWER TO PETITION FOR WRIT OF CERTIORARI
To The United States Circuit Court of Appeals
For the Sixth Circuit.

May It Please The Court:

The answer of respondents, Alma Anderson *et al.* so-called "Adverse Defendants" to the Petition of Flora Coyne *et al.* for a Writ of Certiorari, respectfully shows unto this Honorable Court:

"A"
SUMMARY STATEMENT OF THE MATTER INVOLVED.

Petitioners' summary statement of the matter involved, while substantially correct, nevertheless omits certain matters pertinent to the Petition and the cause or issue involved:

In addition to Petitioners' quotation (p. 3) from the oil and gas lease, there is included the following provision which is commonly referred to as the "free assignability clause":

> **"If the estate of either party hereto is assigned—and the privilege of assigning in whole or in part is expressly allowed—the covenants hereof shall extend to their heirs, executors, administrators, successors, or assigns, but no change in the ownership of the leased premises or assignment of rentals or royalties shall be binding on the lessee until after the lessee has been furnished with a written transfer or assignment, or a certified copy thereof; and it is hereby agreed that in the event this lease shall be assigned as to a part or as to parts of the leased premises and the assignee or assignees of such part or parts shall fail or make default in the performance of any covenants or conditions herein contained or in the payment of the proportionate part of the rents due from him or them, such default shall not operate to defeat or affect this lease in so far as it covers a part or parts of said leased premises upon which the said lessee or any assignees thereof shall not make default or make due payment of their proportionate part of said rental."** (R. 22.)

The lease, a printed, formal lease, containing the royalty apportionment clause, until recently had not been the common form of lease used in the State of Michigan. (R. 208, 345, 262, 252.)

Flora Coyne, grantor in the several mineral deeds, represented at all times that she had the right to sell, and was selling, the oil and gas and income therefrom, in specific tracts or descriptions, which is conceded by Petitioners. (R. 241, 212.)

Respondents, so-called "Adverse Defendants," were only interested in purchasing the oil and gas in the North and South Forties, described as the Northwest fractional quarter of the Northeast fractional quarter, and the Southwest quarter of the Northeast quarter of Section 4. (R. 344, 347, 241.) Flora Coyne, grantor, demanded and received for royalty in the North and South Forties sold to Respondents a consideration far in excess of what she would have been willing to sell the royalty in the North-

west Quarter or the Southwest Quarter of Section 4. (R. 294, 295, 240.)

Petitioners' record of references (T. 237 to 254 and 339 to 354) do not support the statements that each Grantee understood that his purchase was subject to the terms of the oil and gas lease as though all of the terms of the lease were contained in the deed word for word. The District Court's findings of facts (R. 211 and 212), likewise the findings by the Circuit Court of Appeals (R. 488) are to the contrary.

The "Coyne Defendants," so-called, received mineral deeds from Flora Coyne covering oil and gas in the Northwest Quarter of Section 4, on which there has not been, and is not likely to be, any production, and without paying any consideration therefor. (R. 38, 39, 211, 212, 270 and 276.)

Petitioners' reference (p. 5) to the record (R. 339) discloses no statement that the testimony of three witnesses was representative of that which would have been given had each of the Grantees in this group been produced.

The owners of the lease are not parties to the suit because their obligations under the lease have not been added to or changed in any manner whatsoever.

The owners of the lease operated the North and South Forties separately, as separate specific tracts or units, and their vendee, Simrall Corporation, the buyer of the oil, paid by separate checks for the oil produced on the North Forty and the South Forty respectively. (R. 165 and 170.)

Shortly after production was obtained in the North and South Forties, Flora Coyne executed separate division orders on each Forty, declaring what remaining interest she had in each description. One such division order was prepared under her express direction. (R. 8 and 238.)

After Flora Coyne had been advised of the royalty apportionment clause in the lease she requested Simrall Corporation to distribute some funds prior to Christmas,

and upon her assurance that she wanted to do the right thing, and that the Coyne Defendants had no interest in the productive acreage, Simrall Corporation released further payment to her and other royalty owners. (R. 328.)

The deletion agreement to which Petitioners refer (p. 7) was drawn at the express request of Flora Coyne after the royalty apportionment clause had been fully explained to her by her own Attorney as well as the Attorney for Simrall Corporation. (R. 328.) It was admittedly signed by Flora Coyne. (R. 308.)

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1944.

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vs.

SIMRALL CORPORATION, *et al.*,
Respondents.

BRIEF DENYING RIGHT TO PETITION FOR WRIT OF CERTIORARI.

1.

OPINIONS OF THE COURTS BELOW.

The opinion of the United States District Court for the Eastern District of Michigan, Northern Division (R. 205-219), is predicated upon a finding of facts and mutual mistake.

> "Now, every one of these parties in this lawsuit have dealt with the actual belief that this entirety clause was not in existence. They knew nothing about it. It is in that Carter lease but not a single person who is a party to this lawsuit and has dealt with it knew anything about it, ever thought of such a thing or expected such a thing, or hoped such a thing during all the time the dealings were going on." (R. 211.)

The United States Circuit Court of Appeals for the Sixth Circuit affirming (R. 494) the District Court, likewise predicated its opinion on the grounds of mutual mistake and in the following language:

> "All parties understood alike the agreement that they made—which was not expressed in the deeds.

Subjecting the deeds to a prorata royalty provision in the lease, was a mistake on the part of both grantor and grantees." (R. 493.)

2.
JURISDICTION.

The Petition for Writ of Certiorari does not state a case falling within any of the categories set forth in Rule 38 of the Revised Rules of the Court.

The Petition for Writ of Certiorari and Specification of Errors are predicated upon questions of fact already found and construed by the District Court and concurred in by the Circuit Court of Appeals and are not proper subjects for review by the Supreme Court on Certiorari.

3.
STATEMENT OF THE CASE.

Omissions and corrections to Petitioners' Statement of the Case are offered under the heading "A" Summary Statement of the Matter Involved, of Respondents' answer to the Petition, and are not herein repeated.

4.
SUMMARY OF ARGUMENT.

All questions assigned in Petitioners' Specification of Errors (p. 14) involve and are predicated upon facts already found and construed by the Courts below.

Point (A)

Where the contract is between royalty claimants only, and the rights of the lessee and its assigns are not involved, the royalty apportionment clause does not in any wise prohibit or prevent the lessor from assigning a portion of the royalty reserved or to be paid under the lease.

Point (B)

The decision of the United States Circuit Court of Appeals for the Sixth Circuit is not predicated upon the legal proposition that where there is a mistake on one side, and knowledge of the mistake plus concealment, on the other, the reformation will be decreed. The decision of both Courts below is predicated on the finding of mutual mistake and mutual intention of the parties.

> "All parties understood alike the agreement that they made—which was not expressed in the deeds. Subjecting the deeds to a prorata royalty provision in the lease, was a mistake on the part of both grantor and grantees. They never intended to do this; but, as it affirmatively appeared, they intended to do something entirely different." (R. 493.)

Point (C)

The decision of the United States Circuit Court of Appeals for the Sixth Circuit is not of general importance; the lease involved, containing the royalty apportionment clause, until recently has not been the common form of lease used in the State of Michigan.

ARGUMENT.

All questions assigned in Petitioners' Specification of Errors involve and are predicated upon facts already found and construed by the Courts below.

The Court will not review on Certiorari questions of fact found by and concurred in by the Courts below.

Page vs. Arkansas N. G. Corp., 286 U. S. 269;
Workmen vs. N. Y., 179 U. S. 552;
Schwartz vs. Duss, 187 U. S. 8;
Boehmer vs. Penn. R. Co., 252 U. S. 496;
Pick Mfg. Co. vs. Gen. Motors Corp., 299 U. S. 3.

The oral findings of fact by the District Court are found at pages 205 to 219 of the Record, and the concur-

rence in these findings by the Circuit Court of Appeals is found at pages 486 to 494 of the Record, and, in the interest of brevity, are not here repeated.

Point (A)

Petitioners concede that the royalty apportionment clause does not prohibit the lessor from assigning a portion of the royalty reserved or to be paid under the lease but contend that if it is assigned, either in whole or in part, it will be ineffectual because of the provisions of the royalty apportionment clause. The fallacy of such a contention is at once apparent. In the instant case neither the lessee, nor its assigns, are parties to the suit since their rights and obligations are neither diminished nor increased. The lessee and its assigns, through their vendee, the Simrall Corporation, one of the parties litigant, are ready and willing to pay the royalty directly to the respondents in accordance with the several mineral deeds and proportions therein set forth in specific tracts.

The royalty apportionment clause in the lease in question has been inserted for the sole benefit of the lessee and its assigns. Under this clause the lessee is free to continue or discharge any part of the lease without incurring any obligation either to the lessor or lessor's grantees under mineral deeds. Can it be said that the royalty apportionment clause in a lease that has been discharged, as to a part of the leased premises, will be effective in a new and subsequent lease of the same premises not containing a royalty apportionment clause? It is at once apparent that the lessee or its assigns can, without the consent of either the lessor or the lessor's grantees of royalty interests, destroy the effectiveness of the apportionment clause, merely by discharging any part or the entire lease. Since the grant of the royalty right by mineral deeds covers and includes minerals in place as well as in severalty it obviously cannot be argued that the apportionment

clause contained in the lease discharged will be binding in the event all interested owners of minerals join in a new grant or lease not containing the royalty apportionment clause.

The royalty reserved under the lease involved is the property of the lessor at the time of the production. The lessee's obligation is to deliver it to the pipe line, or if it so elects, purchase it at the market price prevailing, but nevertheless for the credit of the lessor. Flora Coyne was the owner of the royalty oil produced from any one of the separately described tracts; she had the right to contract, to transfer all or any portion of such ownership; she had the will to transfer it and to receive a consideration for such transfer, and she did contract and transfer a portion of it to the grantees named in her mineral deeds.

The material rights of lessor in the leased contract are:

1. To receive credit in the pipe line of one-eighth of the oil produced, or the value thereof, if lessee elects to purchase that one-eighth;

2. The right to alienate the royalties provided in the lease contract by any means she sees proper. Such alienations can have full effect if they do not increase lessee's obligations or diminish its rights.

3. The only material obligations of lessors is their obligation to warrant and protect the title and thus keep the lessee in peaceable possession.

The apportionment clause, being placed in the lease for the benefit of the lessee, must be interpreted in the light of its purpose to give protection to the lessee. If it were put in the lease for the protection of the lessor she waived that protection when she contracted to sell and did sell Respondents the royalty oil produced from the North and South Forties, and not in any other part of the leased premises. If the lessee is willing to pay, and the lessee by and through their vendee, the Simrall Corporation, parties litigant herein, are willing to pay their royalty directly to Respondents,

then the lessor Flora Coyne cannot object since she has sold such interest to Respondents. If the lessee should have insisted on delivering the royalty oil to Flora Coyne, and there is no evidence that lessee has so insisted, then a Court of Equity would decree her a trustee for her grantees under the several mineral deeds.

In view of Simrall Corporation's offer, as vendee of the lessee, Flora Coyne cannot object on the ground that such payment would violate some right of the lessee. Nor does it lie in the mouth of Flora Coyne to raise any objection to the lessee of their vendee, Simrall Corporation, delivering such royalty oil produced from the North and South Forties. In her mineral deeds she agreed to do this and she cannot now object because the lessee's vendee is willing to comply with her agreement with Respondents. This rule is clearly set forth in *Martin vs. National Surety Company,* 300 U. S. 588.

> "while an assignment of a part of the funds due to a contractor for constructing a Post Office was absolutely void as against the Government, it was valid between the parties, and that as soon as the Government paid the money to the assignor (or his subsequent assignee who had knowledge of the former assignment), it became impressed with an equitable trust and the first assignee was entitled to recover the money. In other words, the fact that the assignment was void insofar as the debtor, the Government, was concerned, was not an objection that could be raised by the assignor. It could only be raised by the Federal Government."

Point (B)

The decision of the United States Circuit Court of Appeals for the Sixth Circuit is not predicated upon the legal proposition that where there is a mistake on one side, and knowledge of the mistake plus concealment, on the other, the reformation will be decreed. The decision of both Courts below is predicated on the finding of mutual mistake and mutual intention of the parties.

"All parties understood alike the agreement that they made—which was not expressed in the deeds. Subjecting the deeds to a pro-rata royalty provision in the lease, was a mistake on the part of both grantor and grantees. They never intended to do this; but, as it affirmatively appeared, they intended to do something entirely different." (R. 493.)

It was, and is now, admitted (pp. 5 and 6) and conceded that all parties dealt without knowledge of the existence of such a clause as the royalty apportionment, or had ever heard of such a clause. Since none of the parties to the several mineral deeds knew of the presence or existence of a royalty apportionment clause, it was obviously their intentions to effect a sale of royalty interest without consideration for such a clause. Thus the mineral deeds as prepared did not carry out the intentions of the parties.

The effect now erroneously claimed by Petitioner was to convey a small interest under a forty acre tract and a like interest under an utterly different tract contrary to the intentions of the parties.

The question arises: what caused the parties to execute a mineral deed that did not carry out the intentions of either party. The answer is, ignorance of the royalty apportionment clause in the lease and total ignorance by all parties of the existence of such clause.

That the mistake was mutual, and the deeds Flora Coyne executed and delivered did not express the true intentions of the parties, is confirmed by her acceptance of royalty payment from specific descriptions, without taking into consideration any apportionment clause, for upwards of one (1) year; that upon her being informed of the existence of such a clause in the lease and its possible legal effect upon royalty, she stated that it would be unfair to divide the royalty otherwise, expressed her desire and willingness to sign an agreement to confirm the intentions of all the parties; she further stated that the Coyne defend-

ants, Petitioners herein, who had obtained royalty interests as gifts in the Northwest Quarter where no production was had, nor has been had, that they, the Coyne defendants, had no interest in the funds from the productive acreage. (R. 10, 258, 327, and 328.)

In arriving at the intention of all the parties' dealing concerning the mineral deeds, we must not only consider what they said, but what they did subsequent to making these contracts.

> "Subsequent conduct of parties to a contract may be considered in arriving at their intentions." *Gladys Belle Oil Company vs. Clark,* 147 Oklahoma 211.
>
> "Where parties to a contract have themselves placed a construction on the agreement, they should be bound thereby." *Peck vs. Hopcroft,* 249 Michigan 579.

Petitioners again offer *Harley vs. Magnolia Petroleum Corporation* (Illinois), 37 Northeastern Reporter, Second Edition 760, as in point. The distinction in that case and the case at bar is clearly set forth in the lower Court's Opinion (R. 490-492) and need not here be restated.

Reformation is the proper remedy to carry out the express actual intent of the parties where the evidence is clear that both parties had reached an agreement, and as the result of mutual mistake, the instrument did not express the true intent of the parties.

Blake vs. Fuller, 274 Michigan 534;
Ross vs. Damm, 271 Michigan 474;
Retan vs. Clark, 220 Michigan 493;
Crane vs. Smith, 243 Michigan 447;
Colin vs. Masecar, 80 Michigan 139;
Nordberg vs. Todd, 254 Michigan 441;
Bush vs. Merriman, 87 Michigan 260.

> "It is a principle of not infrequent application that where a contract is so broad in its language as to convey matters of which the parties were ignorant, equity may confine its application to the real purposes of the

bargain." *Shelby vs. Creighton* (Nebraska, 96 Northwestern 382).

The testimony, and the facts found by the lower Courts, show with required clarity such mutual mistake as would justify reformation of the mineral deeds to effect the admitted intent of all parties.

In the instant case the respondents purchased royalty interests in the North and South Forties prior to any production; they gambled on the presence of oil or gas in these descriptions to the exclusion of all other land owned by Flora Coyne. Flora Coyne having demanded and received a greater consideration for the mineral deeds covering the land subsequently proved productive, than she would have received or accepted for other land not yet proved productive, cannot now suggest or contend that the remedy ought to be rescission. This is not the case of a unilateral mistake calling for rescission but is clearly one of unmistakable mutual mistake, the remedy for which is reformation.

> "Cancellation will not be decreed for mistake where reformation of the instrument will furnish an adequate remedy, especially where cancellation would be inequitable; and it has been held that the power should not be exercised against a party whose conduct has in no way contributed to or induced the mistake, and who will obtain no unconscionable advantage thereby." 9 *C. J.* 1168.

Point (C)

The decision of the United States Circuit Court of Appeals for the Sixth Circuit is not of general importance; the lease involved, containing the royalty apportionment clause, until recently has not been the common form of lease used in the State of Michigan.

The testimony of witnesses (R. 252-262, 345), experienced in the oil and gas industry, clearly indicates that this form of lease containing a royalty apportionment

clause has not been commonly used in the State of Michigan. It was not the type of oil lease ordinarily used in the State of Michigan as stated by the Circuit Court of Appeals. (R. 488.) One of the witnesses (R. 262) testified to almost ten years experience in the business of buying crude oil, and of having kept account of approximately three hundred leases, and that she had never heard of such a clause in another lease.

Any increasing use of a royalty apportionment clause in a lease will obviously be followed by an increasing knowledge of its presence, with resultant consideration and notice thereof in respect of contractual relations between the lessor and his grantees of mineral interests.

It is unlikely a situation similar to the case at bar will again arise; the facts upon which the case is found, and was determined, are unusual and not of general interest.

The lessee, and its assigns, in the instant case are typical of the many oil producers in the State of Michigan; likewise the Simrall Corporation, parties herein and vendees of the lessee, are typical of the many buyers of crude oil operating in the State of Michigan. It cannot be said that their operations and activities under the lease have been rendered chaotic as the result of the presence of the royalty apportionment clause in the lease. On the contrary, their obligations under the lease not having been diminished or increased in any respect whatsoever, they are willing and ready to pay the reserved royalty to the lessor and her grantees in accordance with the lessor's several conveyances thereof.

The only state of chaos likely to be created will arise, if at all, out of any attempt on the part of the lessor to repudiate his contractual obligation and conveyances of minerals in respect of the reserved royalty.

CONCLUSION.

Respondents, therefore, submit that the Petition for Writ of Certiorari is predicated upon facts already found and concurred in by the District Court and the Circuit Court of Appeals; that the integrity and inviolability of contracts have been *preserved* under the opinions of the Courts below; that the Petition is without merit and Respondents respectfully request that it be denied.

Respectfully submitted,

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(27)

In the Supreme Court of the United States

OCTOBER TERM, 1944.

FLORA COYNE, *et al.*,
Petitioners,
vs.
SIMRALL CORPORATION, *et al.*,
Respondents.

No. 230.

ANSWER TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT, WITH SUPPORTING BRIEF.

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SUBJECT INDEX.

TABLE OF CASES CITED.

In the Supreme Court of the United States

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No. 230.

ANSWER TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT, WITH SUPPORTING BRIEF.

May it Please the Court:

The Answer of Simrall Corporation, the Respondent herein, to the Petition of Flora Coyne, *et al.*, for a Writ of Certiorari, respectfully presents to this Honorable Court:

I.

SUMMARY STATEMENT OF THE MATTER INVOLVED.

Petitioners' statement of the case is largely correct. However, some correction of inaccuracies and supplying of additional information is essential to a complete presentation. Petitioners' statements on page 5 might mislead this Court into the conclusion that some of the parties had knowledge of the lease clause at the time of their mineral purchases. The statement stems from a badly garbled transcript of testimony, a product of incompetent reporting. The only completely reliable reference is the very complete finding of fact by the Trial Court in its opinion (R. 205-219) which was competently reported and the concurring condensation of same in the unanimous opinion of

the Appellate Court (R. 485-494). However, Petitioners admit complete ignorance on the part of all parties in the following paragraph.

Petitioners' statement on page 6 that Simrall Corporation discovered in November, 1939, that it had made a mistake is incorrect. About October 8, 1939, Simrall Corporation discovered the apportionment clause (R. 326) and it was from it that all other parties, including Flora Coyne and her counsel, received their information (R. 216).

Contrary to Petitioners' statement on page 7 concerning the deletion agreement, same was drafted to carry out the admitted intent of all parties. It was executed and delivered by a large number of parties, including the operators of the lease. Flora Coyne and at least one of her children likewise executed (R. 328, 356) but denied that they made delivery. The contract never became fully operative because it was never completely executed, but cognizance must be taken of it as showing the desire of the lease operators, for whose benefit the clause was inserted in the lease, to render such clause non-operative.

The basic difference between the claim of Petitioners and the claim of Respondents develops from a varying conclusion of fact—not from a conflict of law.

Petitioners say that because the mineral deeds recited that they were subject to the lease, and also because the lease was of record, the clause must be deemed to be incorporated in the deeds; that the intent was to make the deeds so subject to all of the terms of the lease regardless of what those terms were.

Respondents claim that while they knew there was a lease, they believed it was the regular Michigan form with which they were all familiar; that all were in total ignorance that there was a different form of lease such as the present one in existence; that all mutually assumed they knew the terms since they knew no other; that they contracted on this mutual assumption.

If the actual admitted intent of all parties constitutes the substance of the meeting of the minds, one contract results; if the intent formally expressed in the deeds controls, a different contract results. We are thus dealing with two conflicting claims as to the true contract. The Trial and Appellate Courts preferred admitted substance to artificial form and granted reformation of the form to comply with the substance.

This Respondent was the interpleading plaintiff in the Trial Court. Because of the security afforded by the impounded funds and its impregnable position on estoppel (which the Appellate Court did not have to consider in arriving at its decision), the two Courts were correct in their conclusion that this Respondent is interested only in determining the proper recipients of the royalty funds. This position gives rise to the question as to why we should object to the granting of the Petition. In this regard, we desire to point out that by order of the Trial Court, this Respondent is not released until final disposition, and it has an interest in preventing a further prolonging of this vexatious litigation with its attendant expenses. It likewise conceives it its duty to the Courts to aid in preventing a miscarriage of justice.

II.

REASONS RELIED UPON FOR DENIAL OF THE WRIT.

Respondent's position, briefly summarized, is as follows:

Petitioners are stressing three reasons for the allowance of the Writ.

Reason one, a statement of law, is applicable and has merit only if we totally disregard the finding of fact by the Trial Court and the concurrence therein by the Appellate Court. The statement of law and authorities in support thereof apply with equal force to Respondent's contentions, it being solely a question of what the true contract was between the parties.

As to reason two, Petitioners are laying undue stress upon a statement of law that in our opinion is not involved in this case. The Court made a bare recital of this proposition in conjunction with a number of other citations applicable to somewhat similar situations. The statement that the decision of the Appellate Court is predicated on the recited legal proposition is fallacious. A study of the decision will not support Petitioners' contention.

The claim that the present decision is of general importance is not tenable. The decision by its factual basis is a precedent of value only in isolated situations.

It is the settled law of this Court to accept as correct findings of fact in which the District Court and the Court of Appeals have concurred, but Petitioners for the third time are urging the finding of fact and the drawing of conclusions therefrom contrary to the admitted intent of all parties.

In further answer to Petitioners' position, we call the Court's attention to the fact that the Petition has not met in the slightest degree the requirements of Rule 38 of the United States Supreme Court Rules, and especially Section 5 thereof.

WHEREFORE RESPONDENT RESPECTFULLY PRAYS that this Honorable Court deny Petitioners' application for Writ of Certiorari. And your Respondent will ever pray.

BRIEF DENYING RIGHT TO PETITION FOR WRIT OF CERTIORARI.

I.

The Opinion in the United States District Court for the Eastern District of Michigan, Northern Division, may be found in the Record on page 205.

The Opinion in the United States Court of Appeals for the Sixth Circuit is reported in 140 Fed. 2nd, page 574, and also may be found in the Record on page 486.

II.

JURISDICTION.

The Petition does not comply with the provisions of Rule 38 of the United States Supreme Court Rules, and especially Section 5 thereof, and likewise Rule 12, which relates to jurisdiction, has not been satisfied by the Petitioners.

III.

STATEMENT OF THE CASE.

In view of the inaccuracies and omissions in the Petition, Respondent has prepared a statement correcting such inaccuracies and added such omitted facts as were necessary. These have been heretofore set forth in the Respondent's Summary Statement (Answer to Petition, p. 1).

IV.

ARGUMENT.

Summary of Argument.

Point A.

The decision of the United States Circuit Court of Appeals for the Sixth Circuit does not do violence to any universal and fundamental rules of law.

Point B.

Petitioners' second proposition of law is unimportant to a determination of the issues herein involved.

Point C.

The decision of the Appellate Court is not of general importance.

Point D.

The granting of the Petition could only be done by ignoring the rules of this Court and by a reversal of policy in regard to reviewing questions of fact.

POINT A.

It must be borne in mind that this is purely a dispute between a group over the division of a sum of money derived from the sale of royalty oil. The lessee is not involved; the validity of the lease clause is not in issue. Petitioners' argument and citation of authority would have some weight if they owned the lease and were defending a lessee insisting upon strict conformity with the lease clause. But the owner of the lease is satisfied. It continues to receive the only thing that it is really interested in—the proceeds from 7/8 of the production. It has no interest in the remaining 1/8 royalty interest. Both Court opinions point this out. With this in mind, it is apparent that the clause was inserted for the convenience of the lessee in making payment. No other conclusion is possible from a reading of the lease. The only evidence in the case, produced by Petitioners' own expert witnesses, substantiates this finding. (R. 371, 379.) Had the lessee insisted upon disbursal of the royalty on a pro rata basis, there is nothing in either opinion denying it this right. That the lease operators do not care to so insist is best evidenced by their execution and delivery of the agreement taking from them the right to control payment.

It cannot then be said that Flora Coyne's acts were unlawful or ineffectual. We have no argument with the Petitioners' citation of the authority but submit that it has no proper application to this case. Other litigation involving this lease provision is carefully differentiated in the Appellate Court's opinion, particularly *Harley v. Magnolia Petroleum Company, et al.*, 378 Ill. 19, an authority heavily relied upon by both sides in the Appellate Court.

Petitioners' statement of the law under POINT A is well put and amply supported by their brief. Insofar as the statement confines itself to citation of authority, it fully supports Respondent's contentions, but Petitioners' arguments reflect a grave misconception of the foundation of this case.

The Court has not made an agreement for the parties which they never agreed upon. To the contrary, it merely enforced the only agreement upon which their minds actually met. This meeting of the minds was the true agreement. As the Appellate Court said, "the evidence clearly disclosed that they mutually intended and contracted on the common understanding that royalties would be paid only to the owners of interests in the parcels from which oil was produced." (R. 492.)

This was the substance of the understanding. They erred in carrying it out because all presumed (never having heard of any other type of lease) that the usual Michigan form of lease was involved, with the result that the instruments used did not reflect the true understanding. Petitioners are for the third time continuing their error in confusing form and substance; they are urging that the lease clause must be considered written into the deeds because the deeds refer to the lease, and even if they did not, the lease was of record first. The result of this contention is a different contract than the parties intended. It is a different contract than the Court is talking about. There

is no controversy concerning the law of contracts or the power of a court to reform, but only as to what the contract was in fact. In determining the true agreement based upon a mutual intent, the Court made a finding of fact which is conclusive.

The Petitioners have competently outlined the law applicable to this situation. We see no necessity of adding thereto and in the interest of brevity, adopt Petitioners' citation of authority as our own.

POINT B.

This Respondent agrees that the cited proposition does not apply directly to the case involved but submits that the Petitioners are frantically grasping for a straw in asserting that the Appellate Court's decision is predicated on this proposition. As Petitioners well know, the gist of this case is set forth as follows (R. p. 491):

> "In discussing the legal principles applicable to the cited case, it was said that reformation would be granted on the ground of mutual mistake where the mistake was one of fact, and where the proof clearly and convincingly shows that a mistake was made and that it was mutual and common to both parties."

POINT C.

It is significant that Petitioners urge equities in favor of unknown purchasers of mineral interests and of the owners of the present lease, none of whom are involved here. The reason is obvious—Petitioners have no equities of their own to present. Their situation is so contrary to equity and good conscience that they would prefer to overlook this phase and have others forget it likewise. They attempt to becloud and confuse the issue by talking of chaotic conditions that they claim will result from the present decision. For a court to sanction their attitude is to violate every fundamental conception of justice. As the Trial Judge so aptly put it (R. 214, 215):

"In this case, take the sixty people and try to work out a result by which nobody would be getting what they expected—not one; some getting more, some getting less, nobody getting the results that they anticipated. That is one of the things that make people suspicious of their laws, their Courts, when they reach such a decision. Shouldn't do it."

Petitioners state that now buyers and sellers will not know their rights if they purchase minerals in premises subject to this type of lease. This decision will not affect this situation since if such parties purchase with this knowledge, the doctrine of this case is not applicable. The case is predicated upon a factual status of total ignorance by all parties, not only as to the terms of the particular lease, but also that such a lease form is even in existence. The facts came into being approximately six years ago. It is unlikely that an identical situation can again occur. As Petitioners point out, many modern forms contain such a lease clause. With increased use, knowledge of it becomes widespread and the possibility of future controversies is reduced to the vanishing point. This very case, by virtue of the fact that a considerable number of parties are involved and the publicity received by it in its progress through successive courts, would certainly be an educational factor in acquainting those persons who engage in royalty buying and selling with this type of problem.

Petitioners stress that the rights of royalty purchasers are more or less at the mercy of the lessee. There is truth in this statement but it does not grow out of the present opinion. The fault lies not in this decision but in the use of the clause and the infrequent occurrence of a sale of royalties under a description less than that contained in the lease. The lessee can effectively alter the rights by merely discharging the unproductive portion of the lease, a right that no one disputes that it has. In the exercise or non-exercise of this power lies the real difficulty in determining the future rights of royalty owners.

It is the considered opinion of this Respondent, one of the largest Michigan purchasers of crude oil, that the decision of the Appellate Court is not of general importance, that it grew out of an isolated situation, and except in exceedingly unusual circumstances, it is a precedent of no value. It is of real importance only to the Petitioners, the balance of the Respondents and their respective counsel.

POINT D.

The Petition does not come within the purview of Rule 38, and particularly Section 5 thereof. The record is barren of any claim that a Federal question of any kind is involved; the decision is not in conflict with any decision of any other Circuit Court of Appeals on the same matter; Petitioners admit (page 28) that there is no local law in conflict because the Michigan Supreme Court has not passed on the matter; there has been no departure from the accepted and usual course of proceeding.

Moreover, this Court does not grant Certiorari for the purpose of reviewing evidence and discussing specific facts. Unless clear error is shown, this Court will accept as correct findings of fact in which the District Court and the Court of Appeals have concurred (*Coryell v. Phipps,* 1943, 317 U. S. 406).

Examination of the Specification of Errors shows clearly the confusion of Petitioners. All, with the exception of the sixth, involve either a finding of fact, a conclusion to be drawn from the facts, or a mixed question of law and fact. As to the sixth Specification of Error, it should be noted that the Petitioners are not the lessee and do not represent the lessee. No rights of the lessee could conceivably be affected by the opinion since the lessee was not a party to the action.

CONCLUSION.

In view of the long established tradition of this Court and embodied in its rules that a review on Writ of Certiorari is not a matter of right but of sound judicial discretion and will be granted only where there are special and important reasons therefor, Respondent respectfully submits that the Petition is without merit for the reasons aforesaid and does not establish the proper basis for exercise of this Court's discretion.

Respectfully submitted,

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